Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioner,

vs.

WASTE MANAGEMENT, INC., OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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96-1252

QUESTION PRESENTED

Whether, in a dormant commerce clause challenge to a municipal solid waste flow control regulation which discriminates in favor of a publicly owned and operated disposal facility but not among members of the private sector, the *Pike* test is the appropriate standard of review.

LIST OF PARTIES

The parties are plaintiff-respondent, Waste Management of Tennessee, Inc., a Tennessee corporation, and defendant-petitioner, The Metropolitan Government of Nashville and Davidson County, the local governing authority of Nashville and Davidson County, Tennessee.

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THE OPINIONS BELOW

Petitioner seeks a writ of certiorari for review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this cause. The opinion is reported. *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson County,* 130 F.3d 731 (6th Cir. 1997). The opinion was filed November 5, 1997. The opinion is set forth at pages 1a through 17a of the appendix to this petition. The United States District Court entered its memorandum and order in this matter on May 17, 1995. The memorandum and order are at pages 18a through 43a of the appendix.

JURISDICTION

The Appellate Court judgment was filed November 5, 1997. No rehearing was sought. The jurisdiction of this court is pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The Commerce Clause of the United States Constitution is at Article I, § 8, cl. 3, which provides that:

> The Congress of the United States shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Also involved is the Metropolitan Government's "Regulation on Collection and Disposal of Solid Waste,"

which is set forth in the appendix at pages 44a through 54a.

STATEMENT OF THE CASE

Proceedings Below

Plaintiff Waste Management, Inc. of Tennessee, filed a complaint on May 12, 1994, challenging, inter alia, the flow control provisions of the Metropolitan Government's "Regulation on Collection and Disposal of Solid Waste" as being violative of the dormant Commerce Clause and seeking a preliminary injunction against enforcement thereof. An amended complaint was filed May 26, 1994. The Metropolitan Government filed a response on May 27, 1994, and the matter was argued before the Magistrate Judge on June 2, 1994. On June 10, 1994, the Magistrate Judge issued his Report and Recommendation to the District Court, recommending that the Regulation be upheld.

Defendant filed its answer on June 10, 1994. The Plaintiff filed a second amended complaint, challenging another solid waste regulation, on August 4, 1994. On August 18, 1994, the Metropolitan Government filed an answer to the second amended complaint.

Thereafter the parties filed cross-motions for summary judgment. The District Court issued a memorandum and order on May 17, 1995, upholding the constitutionality of the Regulation's flow control provision. The Sixth Circuit reversed in an opinion filed November 5, 1997. Pending the filing of this Petition, and on motion of the Metropolitan Government, issuance of

the mandate has been stayed. Although the litigation involves matters other than flow control, certiorari is sought only on the flow control issue.

The Relevant Facts

The Metropolitan Government's "Flow Control" regulations require that most solid waste collected within the boundaries of Davidson County be disposed of at a location designated by the Metropolitan Government's Director of Public Works. For purposes of this lawsuit, this requirement means that the Respondent must furnish periodically a designated amount of solid waste to the Nashville Thermal Transfer Plant – Metro's waste-to-energy facility – which burns garbage as fuel to produce heating and air-conditioning to service some forty downtown buildings. Respondent challenges flow control as being violative of the Commerce Clause.

On December 20, 1990 the Metropolitan Government promulgated its "Regulation on Collection and Disposal of Solid Waste" with an effective date of January 2, 1991 (hereinafter the "Flow Control Regulation" or "the Regulation"). The Regulation has been amended twice, once in 1993 and once in 1994. A copy of the Flow Control Regulation, with its amendments, is at pages 44a through 54a of the appendix. Sections II(b) and II(e) of the Flow Control Regulation require that solid waste collected within the boundaries of the Metropolitan Government must be disposed of at sites approved by the Metropolitan Government. This also is a licensure regulation, requiring that persons doing business in any aspect of solid waste management in Davidson County, not just disposal, be

licensed, and it also establishes procedures governing the issuance, supervision and revocation of licenses. The Regulation was promulgated pursuant to Tenn. Code Ann. § 7-54-103(d); and also relied upon various provisions of the Metropolitan Charter and local ordinances.

The Flow Control Regulation provides, at Section II(b), that disposal of solid waste (as therein defined) collected within the boundaries of the Metropolitan Government must be at a site designated by the Director of Public Works. Initially, the municipal landfill and the Thermal Plant were designated sites. The municipal landfill closed permanently in March of 1994. Other locations have since been approved, including appellant's waste transfer station located in Davidson County, and its landfill in Benton County, Tennessee.

The Thermal Plant is a waste-to-energy production facility owned by the Metropolitan Government and located in Davidson County. It is operated for the Metropolitan Government by the Nashville Thermal Transfer Corporation, pursuant to an ordinance and contract. The not-for-profit Corporation exists for the sole purpose of operating the plant. The plant is financed by bonds secured by the Metropolitan Government. The Thermal Plant has contracts to supply 38 downtown Nashville buildings with heating and air conditioning; these contracts extend into the twenty-first century. To fulfill these contracts, the Thermal Plant needs approximately 900 tons per day of solid waste, or 6,300 tons per week, to burn as fuel. Of this amount, Metro controls the disposal of approximately 600 tons per day, or 4,200 tons per week. Therefore, approximately 300 tons per day, or 2,100 tons per week, is needed from the private sector. Under

the Regulation, the Metropolitan Government issues allocations to the major haulers, including Waste Management, setting amounts for them to deliver to Thermal. Smaller haulers are not issued allocations because they already deliver virtually 100% of their waste to Thermal. In addition to serving the need to meet long-term contractual obligations, flow control is an integral part of the Metropolitan Government's State-mandated solid waste management plan.

Waste Management, during the pendency of this lawsuit, refused to deliver its allocated share of waste to the Thermal Plant, instead delivering it to a transfer station it owns which is located within the boundaries of the Metropolitan Government, and thereafter to its landfill in Benton County, Tennessee. On at least one occasion, waste was delivered from the transfer station to a landfill in Kentucky.

ARGUMENT

I

The Commerce Clause of the United States Constitution, Article I, § 8, grants to Congress the power to regulate interstate commerce. The so-called negative, or dormant, commerce clause states the corresponding principle: the states (and their political subdivisions) are prohibited from regulating, or burdening, interstate commerce. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 at 535 (1949). The constitutional purpose is to assure that "our economic unit is the Nation . . . that the states are not separable economic units." *H.P. Hood & Sons, Inc. v.*

DuMond, 336 U.S. at 623 (1949). If a law discriminates against interstate commerce, it is subject to a strict scrutiny test, and is "virtually *per se*" invalid, unless the government can show that it lacks any other means of accomplishing a legitimate governmental interest. *Philadelphia v. New Jersey*, 437 U.S. 617 at 624 (1978). But if the law is not discriminatory, yet does burden interstate commerce, then it is subject to a balancing test; and will be found valid unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 at 142 (1970).

In recent years, flow control regulations and ordinances have been challenged several times on Commerce Clause grounds. Flow control measures are those requiring solid waste to be disposed of at locations designated by the regulating authority. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 at 386 (1994). Since 1978, this Court has held that garbage is an article of commerce and therefore subject to the provisions of the commerce clause. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The Court has twice in recent years spoken directly to the flow control issue, in *Carbone* and in *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992). The question continues to be an important one nationally, as governments struggle with problems of solid waste management. Already this Term, the Court has had two flow control cases before it. *Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders*, 112 F.3d 652 (3d Cir. 1995), *cert denied sub nom. Shinn v. Atlantic Coast Demolition & Recycling, Inc.*, 118 S. Ct. 413; and *Ben Oerleins & Sons & Daughter, Inc. v. Hennepin*

County, 115 F.3d 1372 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 643. (Neither petition addressed the issue raised here.) The importance of this issue nationally is further shown by the fact that there are currently at least three bills pending in the Congress related to flow control.[1]

This case presents an issue on which the Court has never spoken: whether a flow control measure which discriminates in favor of a public waste disposal facility, but not among private sector entities, should be evaluated under the per se rule or the *Pike* test. Although the Court has not decided the issue, several Justices have suggested that the *Pike* test is the appropriate one. The Sixth Circuit's ruling here conflicts with that guidance.

II

Both the District Court and the Magistrate Judge upheld the Metropolitan Government's flow control ordinance under the *Pike* test. App. pp. 24a, 36a. The Sixth Circuit's reversal hinged on its determination that the regulation was discriminatory, thereby triggering application of the per se or strict scrutiny test. The Sixth Circuit nowhere disagreed with the conclusion of the court below that the elements of *Pike* were satisfied; rather, it imposed the more stringent test because, unlike the district court, it found the regulation to be discriminatory. However, the crucial point is that the only discrimination found was in favor of the Thermal Plant – discrimination favoring the public over the private sector. App. pp. 9a-10a. This type of discrimination calls for the *Pike* test.

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[1] *See* S. 899; H.R. 942; and H.R. 943.

Only discrimination favoring one group or category of private interests vis-a-vis another group or category of private interests triggers strict scrutiny. In substituting the per se test the Sixth Circuit erred, running afoul of the guidance by this Court in its rulings on flow control in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) and *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992). It has decided "an important question of federal law in a way that has not been, but should be, settled by" the Supreme Court. *See* Supreme Court Rule 10(c). Furthermore, insofar as there is implicit guidance in the existing relevant decisions of this Court, the Sixth Circuit's ruling "conflicts with" those decisions. *Id.*

In striking down the Metropolitan Government's flow control, the appellate court relied primarily upon *Carbone*, where this Court struck down a flow control ordinance as being violative of the Commerce Clause. The Town of Clarkstown, New York, had caused a transfer station to be erected within its boundaries, and was allowing a private contractor to operate it for five years, after which the town was to buy the facility for one dollar. To finance the cost of the transfer station, the town guaranteed a minimum waste flow to the facility. In order to meet this waste flow guarantee, the town enacted its flow control ordinance, requiring all non-hazardous solid waste within the town to be disposed of via the transfer station. This was found to violate the dormant commerce clause.

As the District Court comments, numerous distinctions exist between the situation in *Carbone* and the situation in this case. The Metropolitan Government's flow

control arrangement is not monopolistic. It does not include the total waste stream. App. at 35a. While all waste appropriate for disposal at the Thermal Plant could, theoretically, be directed there, in practice only a portion is requested by Metro. *Id.* at 33a. The Metropolitan Government's flow control is closely tied to its compliance with a state mandated 25% waste reduction goal. *Id.* at 34a-35a. All of these facts materially distinguish the situation before this Court from the situation in *Carbone*. *Carbone* dealt with a transfer station; this case deals with a waste-to-energy production facility, upon which almost forty downtown buildings depend for heating and cooling. App. at 34a, note 12. In *Carbone*, all waste – including recyclables – had to be taken to the transfer station. Here the Metropolitan Government excludes certain recyclables from regulation, App. at 44a; and does not necessarily require that all of the waste stream potentially subject to regulation actually be brought to the Thermal Plant. *Id.* at 35a-36a. In *Carbone*, the court specifically found that the only purpose of the flow control was financial – i.e., to support the transfer station. 511 U.S. at 393-94. Here, as the District Judge found, other factors are implicated, including but not necessarily limited to compliance with state statutory mandates and honoring long-term contractual commitments to third parties. App. at 34a-35a. But, the single most important distinction is that the transfer station in *Carbone* was not governmentally owned, unlike the waste-to-energy facility in the case at bar.

In that respect, *Carbone* was like *Fort Gratiot Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992). In that case, flow control measures were set by the

State of Michigan which restricted acceptance of solid waste at landfills to those wastes generated within the county where the facility was located. This was held to violate the dormant commerce clause. But in *Fort Gratiot*, the Supreme Court specifically reserved judgment on flow control measures affecting publicly owned and operated facilities. 504 U.S. at 358-59. Justice Stevens, writing for the majority, suggested a need to proceed with caution in reviewing Commerce Clause challenges "concerning policies that municipalities and other governmental agencies may pursue in the management of publicly run facilities." *Id.* The holding in *Fort Gratiot* is applicable to "*privately owned and operated* landfills" only. *Id.* at 359. (Emphasis supplied).

The Chief Justice filed a thoughtful dissent in *Fort Gratiot* (in which he was joined by Justice Blackmun). Noting the substantial health and environmental issues operative in regulating solid waste, he supported a remand for consideration of whether the Michigan flow control measure was a legitimate health and safety regulation, and, as such, potentially exempt from commerce clause restriction under *Maine v. Taylor*, 471 U.S. 131 (1986). 504 U.S. at 368-83 (Rhenquist, C.J., dissenting).

Although he did not rely upon it, the Chief Justice's dissent harks back to this Court's very earliest analyses of solid waste management by governments, and specifically by local governments. In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), a "flow control" measure enacted by the city of San Francisco required all waste to be delivered to a crematory for disposal. This Court upheld the ordinance, as a valid exercise of the police power, in the face of a takings

challenge. To the same effect, *see Gardner v. Michigan*, 199 U.S. 325 (1905). As discussed below, these considerations remain valid today, in that they are part of the reason the *Pike* test applies to publicly owned facilities – and part of the *Pike* balance applicable to such facilities.

Carbone, like *Fort Gratiot*, deals with a privately owned waste disposal facility. Admittedly, the transfer station in *Carbone* lies closer on the continuum to a publicly owned facility than did the landfill in *Fort Gratiot*. Still, it is not a publicly owned and operated facility. The flow control in *Carbone* benefited a private entity – the town's contractor – not the town alone. Metro's flow control benefits only its own public facility.

Justice Souter, joined by the Chief Justice and Justice Blackmun, dissented in *Carbone*. He noted that the Clarkstown flow control ordinance was one which, like the ordinance at issue in this petition, "directly aids the government in satisfying a traditional governmental responsibility", 511 U.S. at 411 – i.e., solid waste management.

> The majority ignores this distinction between public and private enterprise, equating Local Law 9's 'hoard[ing]' of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. But *private businesses, whether local or out of State, first serve the private interests of their owners*, and there is therefore only rarely a reason other than economic protectionism for favoring local businesses over their out-of-town competitors. The local government itself occupies a very different market position, however, being *the one entity that enters the market to serve the public interest* of

> local citizens quite apart from private interest in private gain. Reasons other than economic protectionism are accordingly more likely to explain the design and effect of an ordinance that favors a public facility. . . . An ordinance that favors a municipal facility, in any event, is one that favors the public sector, and if "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position," *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556, 105 S. Ct. 1005, 1020, 83 L.Ed.2d 1016 (1985), then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differ from discriminating among private economic actors, and is much less likely to be protectionist. . . .

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. at 420-21 (1994). (Souter, J., dissenting). (Emphasis supplied).

Characterizing the proprietor favored in *Carbone* as "essentially an agent of the municipal government", 511 U.S. at 416 and the transfer station as "essentially a municipal facility," *id.* at 419, Justice Souter concluded that to favor a municipal facility is to favor the public sector over the private sector, and that the proper test is the *Pike* test.

> [I]n a market served by a municipal facility, a law that favors that single facility over all others is a law that favors the public sector over all private-sector processors, whether local or out of State. Because the favor does not go to local

> private competitors of out-of-state firms, out-of-state governments will at least lack a motive to favor their own firms in order to equalize the positions of private competitors. While a preference in favor of the government may incidentally function as a local favoritism as well, a more particularized enquiry is necessary before a court can say whether such a law does in fact smack too strongly of economic protectionism. If [such a law] is to be struck down, in other words, it must be under that test most readily identified with *Pike v. Bruce Church, Inc.*, 397 U.S. 317, 90 S. Ct. 844, 25 L.Ed.2d 174 (1970).

Id. at 422-23 (Souter, J. dissenting). The dissent in *Carbone*, in short, assumes the facility at issue to be essentially a governmental one – thereby going beyond the reservation expressed in *Fort Gratiot*. Having made this assumption, it concludes the *Pike* test is the appropriate one to employ; and subsequently finds the test to be satisfied.

Justice O'Connor, in a separate concurrence in *Carbone*, likewise holds that the *Pike* test is the proper one. She reaches this conclusion because the ordinance does not geographically discriminate but rather (like that of the Metropolitan Government):

> . . . 'discriminates' evenhandedly against all potential participants in the waste processing business, while benefiting only the chosen operator of the transfer facility. . . . This distinction has more doctrinal significance than the majority acknowledges. In considering state health and safety regulations such as Local Law 9, we have consistently recognized that the fact that interests within the regulating jurisdiction are equally affected by the challenged enactment

> counsels against a finding of discrimination. And for good reason. The existence of substantial in-state interests harmed by a regulation is a 'powerful safeguard' against legislative discrimination. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, n.17, 101 S. Ct. 715, 728, n.17, 66 L.Ed.2d 659 (1981). The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulation.' *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444, n.18, 98 S. Ct. 787, 795, n.18, 54 L.Ed.2d 664 (1978). See also *Kassel v. Consolidated Freightways Corp. of Del.*, 450 U.S. 662, 675, 101 S. Ct. 1309, 1318, 67 L.Ed.2d 580 (1981) (same). Thus, while there is no bright line separating those enactments which are virtually per se invalid and those which are not, the fact that in-town competitors of the transfer facility are equally burdened by Local law 9 leads me to conclude that Local Law 9 does not discriminate against interstate commerce.

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. at 404-05 (1994) (O'Connor, J., concurring). (Unlike the dissenters, she finds that the ordinance fails to meet the *Pike* test, hence her concurrence with the majority's result.)

In addition to *Fort Gratiot* and *Carbone*, this Court has spoken – though indirectly – to this issue in another case, which the Sixth Circuit inexplicably ignores altogether. In *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981) underwriters of revenue bonds to finance a waste-to-energy facility in Ohio (just like the Thermal

Plant in Nashville) imposed a requirement that the city enact a flow control ordinance, which was done. The Sixth Circuit upheld that ordinance, using the *Pike* test, in a challenge based on the Commerce Clause and on antitrust. This Court vacated and remanded for reconsideration – *but solely on the antitrust issue*. 445 U.S. 931. When the case again came before the Sixth Circuit, *Hybud Equipment Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984), the Commerce Clause issue was not discussed; and this Court thereafter denied certiorari, 471 U.S. 1004.

To sum up, Justice Stevens, writing for the majority in *Fort Gratiot*, noted the importance of special policy interests and other considerations pertinent to flow control as it relates to public disposal facilities, and reserved that issue. Four Justices of this Court concluded in *Carbone* that at least where a public waste disposal facility is the favored entity the *Pike* test is the appropriate standard. The majority opinion in *Carbone* does not contradict this because it does not expressly address the issue since technically the transfer station in *Carbone* was not municipally owned or operated. And the Sixth Circuit's own precedent in the *Hybud* cases, which were reviewed by this Court, supports use of the *Pike* test.

This Court has never approved application of the strict scrutiny test to dormant Commerce Clause analysis involving municipal flow control regulations that favor the public over the private sector. Certiorari should be granted here to clarify the status of flow control regulations as they may operate to favor the public over the private sector, particularly in the context of municipally owned facilities. The Metropolitan Government will urge, if the petition is granted, that for the reasons articulated

by the dissenters in *Carbone* as well as Justice O'Connor's concurrence in *Carbone* and the Chief Justice's dissent in *Fort Gratiot*, the *Pike* test is the appropriate one.

CONCLUSION

For the above stated reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WASTE MANAGEMENT, INC. OF TENNESSEE,	)	
Plaintiff-Appellant/ Cross-Appellee,	)	Nos. 95-5863/5900
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant-Appellee/ Cross-Appellant.	)	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 94-00411 – Thomas A. Higgins, District Judge.

Argued: August 6, 1996

Decided and Filed: November 5, 1997

Before: CONTIE, BOGGS, and NORRIS, Circuit Judges.

COUNSEL

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OPINION

ALAN E. NORRIS, Circuit Judge. Plaintiff, Waste Management, Inc. of Tennessee ("WMIT"), appeals the district court's denial of its motion for injunctive relief from enforcement of a flow control regulation and an ordinance which requires that all waste delivered to certain disposal facilities in passenger vehicles and pickup trucks be accepted either free of charge or for five dollars per load, respectively. Both the flow control regulation and the passenger vehicle and pickup truck ordinance were enacted by defendant, Metropolitan Government of Nashville and Davidson County ("Metro"). Defendant cross-appeals the district court's ruling that its waste disposal fee ordinances and their implementing regulation violate the Commerce Clause. We reverse in part and affirm in part.

I.

The parties have stipulated to the facts relevant to this case. Defendant Metro is the local governing authority of Nashville and Davidson County, Tennessee. Between January 1991 and May 1994, defendant promulgated three

classes of ordinances and regulations governing the disposal of solid waste generated within its boundaries. First, the flow control regulation and one of two amendments thereto ("flow control provisions") require that all persons collecting, hauling, or removing waste from Metro be licensed; that the waste be disposed of only at sites approved by Metro; and that all residential waste collected within Metro be disposed of at a waste-to-energy facility owned by Metro and operated by the Nashville Thermal Transfer Corp. ("NTTC").[1] NTTC supplies power to

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[1] The flow control provisions read, in relevant part, as follows:

> (e) Unless otherwise specifically authorized in writing by the Director [of the Department of Public Works], all residential Solid Waste collected within the boundaries of the Metropolitan Government shall be disposed of at the Nashville Thermal Transfer Corporation (NTTC). Non-residential Solid Waste is not required to be disposed of at the NTTC unless designated for disposal there pursuant to the following procedure:
>
> (1) Any Collector of Solid Waste collected within the boundaries of the Metropolitan Government shall report the amount of residential and non-residential Solid Waste collected each month and the amounts of Solid Waste delivered to each Final Disposal Point and/or Intermediate Disposal Point. . . .
>
> (2) At least quarterly, the Department of Public Works shall calculate a pro rata estimate of the amount of non-residential Solid Waste collected by each Collector, using the best available data.
>
> (3) The NTTC shall notify the Director, at least two (2) weeks in advance, of its estimated need for

buildings in downtown Nashville with the energy it generates by burning solid waste. The amended regulation does not require that non-residential waste collected within Metro be disposed of at NTTC, unless that facility has not received the 6,300 tons of solid waste per week it needs to operate.

Second, the waste disposal fee ordinances and their implementing regulation ("waste disposal fee provisions") require that NTTC charge a tip fee of thirty-six dollars per ton, and that all collectors pay Metro a waste disposal fee of eight dollars per ton of waste dumped at sites other than NTTC.[2] This fee must be paid by any

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> Solid Waste for each operating day of the corresponding week. The Department of Public Works shall notify each Collector, at least one (1) week in advance, of its estimated pro rata share of Solid Waste, which may include an amount of non-residential Solid Waste if any, necessary for disposal at the NTTC for the following week. . . .

Public Works Regulation on Collection and Disposal of Solid Waste, Amendment No. 2 (added to Section II of the *Regulation*).

[2] The waste disposal fee provisions read, in relevant part, as follows:

> All metropolitan government sanitary landfills, incinerators or other collection stations shall have tip fees established and all persons shall pay a tip fee of nine dollars per cubic yard or thirty six dollars per ton of loose or compacted refuse, effective November 1, 1993; and all persons shall pay a tip fee of eleven dollars per cubic yard or forty-four dollars per ton of loose or compacted refuse effective January 1, 1995.

Ordinance No. 093-821, Section 5 (amending Section 10.20.200 of the Metropolitan Code of Laws by deleting the existing language in its entirety and substituting this language).

collector operating a facility within Metro for waste collected within Metro, and by any collector collecting such waste and disposing of it outside of Metro. Finally, the passenger vehicle and pickup truck ordinance requires that all waste collectors operating disposal facilities within Metro accept waste delivered by passenger vehicles free of charge,[3] and that such collectors accept waste

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> Any person enjoying the privilege of providing temporary or permanent disposal of solid waste generated or collected within the boundaries of the metropolitan government at a site or facility located within the boundaries of the metropolitan government; or enjoying the privilege of collecting solid waste within the boundaries of the metropolitan government and disposed of outside the boundaries of the metropolitan government; shall pay to the metropolitan government a fee of $2.00 per cubic yard or $8.00 per ton of solid waste or special waste accepted into the site or facility or collected within the boundaries of the metropolitan government and disposed of outside said boundaries. . . .

Ordinance No. 094-1063, Section 1 (amending Section 11A of *Ordinance No. 093-821* by deleting the existing language in its entirety and substituting this language).

[3] The portion of the passenger vehicle and pick-up truck ordinance that concerns passenger vehicles reads as follows:

> Any person enjoying the privilege of providing temporary or permanent disposal of solid waste pursuant to this chapter shall provide without charge sufficient containers at or near the entrance for the use of persons in passenger cars disposing of such waste.

Ordinance No. 093-821, Section 9 (added to Section 10.20.260 of the Metropolitan Code of Laws).

delivered by standard pickup trucks for a fee of five dollars per load.[4] This ordinance does not apply to NTTC because that facility does not accept deliveries from passenger vehicles or pickup trucks.

Plaintiff is one of several waste collectors licensed to collect and dispose of waste within the boundaries of Metro, but it is the only collector which actually operates a waste disposal facility in Metro. The other licensed collectors include Browning-Ferris Industries of Tennessee, Inc. ("BFI") and Sanifill. Each of these collectors dispose of waste differently. Before it opened NTTC, Metro operated a landfill known as the Bordeaux Landfill in Davidson County. Plaintiff, on the other hand, operates a transfer station in Davidson County and landfills in both Benton County, Tennessee and Logan County, Kentucky. Because BFI does not have a transfer station, it brings waste directly to its landfill in Rutherford County,

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[4] The portion of the passenger vehicle and pick-up truck ordinance that concerns pick-up trucks reads as follows:

> Any person enjoying the privilege of providing temporary or permanent disposal of solid waste pursuant to this chapter shall accept waste from private standard pickup trucks at a fee of five dollars per load. No fee shall be paid to the metropolitan government, but a full monthly accounting as to weight, volume and number of trucks shall be furnished to the metropolitan government upon request.

Ordinance No. 093-821, Section 11B (added to Article II of Chapter 10.20 of the Metropolitan Code of Laws as Section 10.20.330, re-numbering the existing Section 10.20.330 as Section 10.20.350).

Tennessee, and Sanifill brings waste to NTTC, plaintiff's transfer station, or BFI's landfill.

In its amended complaint, plaintiff sought declaratory and injunctive relief against defendant, alleging that the flow control and waste disposal fee provisions violate the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3. Plaintiff later amended its complaint again, adding a claim that defendant's passenger vehicle and pickup truck ordinance constituted a taking without just compensation in violation of the Fifth Amendment to the United States Constitution.

The district court permanently enjoined enforcement of the waste disposal fee provisions, but did not enjoin enforcement of the flow control provisions, or the passenger vehicle and pickup truck ordinance. Both parties filed timely notices of appeal as to those portions of the district court's order which were adverse to their respective positions.

II.

Jurisdiction before this court is premised upon 28 U.S.C. § 1292(a)(1). We review a district court's decision to grant or deny a motion for a permanent injunction for abuse of discretion, accepting the court's findings of fact unless they are clearly erroneous. *Loschiavo v. City of Dearborn*, 33 F.3d 548, 553 (6th Cir. 1994). "An abuse of discretion exists when the district court applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993).

A. Commerce Clause

The United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States," U.S. Const. art. I, § 8, cl. 3, and "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits the States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.' " *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949)); *see also Ferndale Lab., Inc. v. Cavendish*, 79 F.3d 488, 492 (6th Cir. 1996). The negative Commerce Clause also limits the actions of municipalities such as Metro, where such actions "burden interstate commerce or impede its free flow." *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 389 (1994).

In deciding if a particular law violates the negative Commerce Clause, a court must first "determine whether [the law] 'regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.' " *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)) (internal quotation marks omitted). A law that discriminates against interstate commerce treats in-state and out-of-state interests differently, benefitting the former and burdening the latter. *Oregon Waste*, 511 U.S. at 99.

If a law discriminates against interstate commerce, it is "virtually *per se* invalid," *id.*, unless "the municipality can demonstrate, under rigorous scrutiny, that it has no

other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. On the other hand, "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' " *Oregon Waste*, 511 U.S. at 99 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *see also City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

1. Flow Control Provisions

Plaintiff argues that the district court erred in ruling that defendant's flow control provisions do not violate the Commerce Clause. The court held that the provisions are nondiscriminatory, with incidental effects on interstate commerce, and that the burden they impose is not clearly excessive in relation to their putative local benefits. It distinguished this case from *Carbone* on the grounds that the provisions at issue here do not totally exclude disposal of waste outside of Metro, or create or result in a monopoly for NTTC. Rather, the court reasoned, plaintiff can still dispose of non-residential waste at facilities other than NTTC that are located outside of Metro or even outside of Tennessee.

Before the court concluded that defendant's flow control provisions do not discriminate against interstate commerce, it proceeded as if they do discriminate. In considering whether defendant had any other means of advancing a legitimate local interest, the court again distinguished these provisions from those at issue in *Carbone*, on the ground that they do not just generate

revenues, which would not be a legitimate local interest justifying such discrimination. 511 U.S. at 393. They also "implicate[ ] significant public environmental interests," such as ensuring that a proportion of solid waste collected within Metro's boundaries is used as fuel, and enabling Metro to comply with Tennessee's Solid Waste Management Act of 1991, Tenn.Code Ann. §§ 68-211-801-874, which requires municipalities to reduce by twenty-five percent the volume of solid waste disposed of in landfills and incinerators in Tennessee.

In *Carbone*, the Supreme Court stated that the flow control ordinance at issue there "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." 511 U.S. at 392, 114 S. Ct. at 1683. The provisions at issue in this case do the same, even though they do not require that all waste be sent to NTTC. They require that all *residential* waste be sent to NTTC, thereby preventing plaintiff from disposing of such waste at a cheaper facility, and threatening the well-being of plaintiff's own dump sites. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), the Supreme Court observed that "[t]he volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce." *Id.* at 455. As we read *Wyoming*, plaintiff's ability to send some waste to facilities other than NTTC goes to the extent of the discrimination, not whether there was discrimination in the first place.

Having determined that defendant's flow control provisions do in fact discriminate against interstate commerce, we must now decide whether "the municipality [has] demonstrate[d], under rigorous scrutiny, that it has

no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at 392. Although defendant may have cited two legitimate local interests, there are other means of advancing such interests, like charging competitive tipping fees for waste disposed of at NTTC. Moreover, Metro concedes that it could secure a flow of waste to NTTC by increasing its collections either directly or by contract, "but this could not be done without legislation and some further time for preparation." Because defendant's flow control provisions are facially discriminatory, and because there are other means of advancing the legitimate local interests cited, these provisions cannot satisfy the rigorous scrutiny to which such laws are subjected under the Commerce Clause. We hold, therefore, that the district court erred in refusing to enjoin their enforcement.

2. Waste Disposal Fee Provisions

Defendant cross-appeals the district court's decision to permanently enjoin enforcement of its waste disposal fee provisions, arguing that the court erred in concluding that they violate the Commerce Clause. We agree with the district court's conclusion that the provisions in question are facially discriminatory, since they treat Metro and non-Metro interests differently. Examples of such differential treatment are the fact that the fee is not imposed upon waste disposed of at NTTC or any other Metro-owned facility, and that it is only imposed upon plaintiff and BFI, both of whom dispose of waste at facilities outside of Metro's boundaries. Once the court found the fee to be facially discriminatory, it was *per se* invalid, unless Metro could demonstrate that it had no other

means of advancing a legitimate local interest. *Carbone*, 511 U.S. at 392.

The district court properly rejected defendant's argument that the fee is a compensatory tax which compensates Metro for "the overall cost of solid waste management in Davidson County," since Metro did not offer any evidence of a specific tax burden on intrastate commerce for which it sought compensation. *See Oregon Waste*, 511 U.S. at 102-03. Not only did Metro fail to demonstrate that it had no other means of advancing a legitimate local interest, both parties acknowledged that there was a reasonable nondiscriminatory alternative in the form of a generator or container tax on all residential and non-residential waste generated within Metro's boundaries. The district court did not abuse its discretion in permanently enjoining enforcement of defendant's waste disposal fee provisions.

B. Takings Clause

The Takings Clause of the Fifth Amendment provides, in relevant part, " . . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The primary purpose of the Takings Clause is to prevent the government from requiring certain individuals to bear burdens which should be borne by society as a whole. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *see also In re Blue Diamond Coal Co.*, 79 F.3d 516, 524 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997). The Supreme Court has recognized two categories of takings: regulatory and physical. *See, e.g., Penn Central*, 438 U.S. 104 (holding

prohibition on construction of fifty-five-story office tower over New York's Grand Central Terminal is not a regulatory taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding cable equipment occupying one and one-half cubic feet of private building is a physical taking).

1. *Regulatory Taking*

The Supreme Court has declined to lay out a set formula for determining whether a regulatory taking has occurred, preferring instead to engage in "essentially ad hoc, factual inquiries." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Central*, 438 U.S. at 124). The Court has, however, identified several factors which have "particular significance" in determining whether there has been a taking, namely 1) the character of the governmental action; 2) the economic impact of the regulation on the claimant; and 3) the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986) (citing *Penn Central*, 438 U.S. at 124); *see also Blue Diamond Coal*, 79 F.3d at 524.

2. *Physical Taking*

A physical taking, on the other hand, occurs where the government physically intrudes upon a plaintiff's property. "[A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432. If, in other

words, the "character of the governmental action" is a permanent physical occupation of property, then the Supreme Court "uniformly [has] found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35.

3. Passenger Vehicle and Pickup Truck Ordinance

Plaintiff argues that the district court erred in ruling that defendant's passenger vehicle and pickup truck ordinance does not violate the Fifth Amendment, but fails to articulate exactly which kind of taking it believes the ordinance causes. Plaintiff did argue to the district court that the ordinance amounts to an invasion and taking of its property because it was required to designate an area on plaintiff's property specifically for receiving waste from passenger cars and pickup trucks. The district court rejected this argument, concluding that plaintiff "has not suffered an easement equivalent to permanent physical occupation of the property" in part because it "is in the business of collecting and disposing of solid waste and, therefore, its physical plants already have the physical modifications required to receive and process such waste." According to the court, the requirements are justifiable intrusions that serve the legitimate state interest of efficient and timely collection and disposal of solid waste.

In determining whether the district court erred when it ruled that defendant's ordinance does not cause a physical taking, we must decide whether the character of the governmental action constitutes a permanent physical

occupation of plaintiff's property. *Loretto*, 458 U.S. at 432. If so, defendant's action is a taking "without regard to other factors that a court might ordinarily examine," *id.*, and "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35.

As one measure of the burden placed upon it by the ordinance, plaintiff points to documents in the record indicating that Metro's Bordeaux Landfill received approximately 50,000 tons of waste from passenger vehicles and pickup trucks in 1989 (the landfill was closed in 1994). Should defendant's ordinance be enforced, plaintiff alone will have to be equipped to accept *all* waste delivered by passenger vehicles and pickup trucks – regardless of how much there is, and regardless of the capacity of its facility – since plaintiff's facility is the only one located within Metro's boundaries that will accept such waste. In addition, the parties stipulated that plaintiff will have to do the following in order to comply fully with defendant's ordinance: (1) allot approximately one-half acre of its nine-acre property to accommodate these services; (2) prepare that designated area with a concrete pad and drains; (3) place containers on that area to receive the waste; (4) physically receive the solid waste; (5) hire personnel and designate equipment to handle such waste; (6) allow access to the property to passenger vehicles and pickup trucks; (7) accept, process, transport and dispose of the waste; and (8) incur the financial costs of accepting, processing, transporting and disposing of the waste at an uncompensated or undercompensated rate.

The stipulations appear to recognize that it is not feasible, either from a safety or economic standpoint, to serve both commercial and non-commercial vehicles in the very same area. If what is being required of plaintiff is that it involuntarily set off and improve a portion of its property for the accommodation of passenger cars and pickup trucks to the exclusion of all other uses, then it seems to us that the effect of defendant's conduct in pursuing its interests is tantamount to defendant's physical occupation of plaintiff's property. However, it is not clear to us from the wording of the stipulated facts that this exclusive dedication of a portion of the property is what is actually being required of plaintiff.

Should the district court conclude on remand that defendant's ordinance did in fact cause a physical taking of plaintiff's property, then it follows under *Loretto* that plaintiff would be entitled to relief regardless of the otherwise legitimate state interest advanced by Metro. 458 U.S. at 434-35.

4. Ripeness

There is, however, one more issue to consider, namely, whether plaintiff complied with the Supreme Court's holding in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), thereby rendering its taking claim ripe for adjudication in federal court.

In *Williamson*, the Supreme Court held that the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Id.* at 194. Thus, where a state provides an adequate procedure for

seeking just compensation, a property owner cannot claim the Takings Clause has been violated until he has used the procedure and been denied just compensation. *Id.* at 195. In *Williamson*, the Court examined Tennessee law and concluded that a property owner in that state could bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. Because the landowner in *Williamson* had not shown that the procedure was unavailable or inadequate, and had not utilized it, the Court concluded that the taking claim before it was premature.

This case, of course, comes to us from Tennessee. Because the ripeness issue was not addressed by the district court, and we are unable to say whether applicable Tennessee law in effect at the relevant time afforded plaintiff an adequate procedure to seek compensation or whether plaintiff utilized it prior to filing his claim in federal court, we must call upon the district court to address the ripeness issue on remand.

III.

We **reverse** that portion of the district court's order which denies plaintiff's motion for injunctive relief from enforcement of the flow control provisions, and we **affirm** that portion of the court's order that grants plaintiff's motion for injunctive relief from enforcement of the waste disposal fee provisions. Finally, we **vacate** that portion of the court's order that denies plaintiff's motion for relief from enforcement of the passenger vehicle and pickup truck ordinance, and **remand** this cause to the district court for further proceedings consistent with this decision.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WASTE MANAGEMENT, INC. OF TENNESSEE	
v.	No. 3-94-0411 Judge Higgins
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY	

MEMORANDUM

The Court has before it the Report and Recommendation (entered June 13, 1994; Docket Entry No. 17) of the Magistrate Judge; the defendant's objections (filed June 24, 1994; Docket Entry No. 23); the plaintiff's objections (filed June 24, 1994; Docket Entry No. 24); the plaintiff's response (filed July 11, 1994; Docket Entry No. 30); and the defendant's response (filed July 11, 1994; Docket Entry No. 31). The Court hereby makes a *de novo* determination of the case upon the record, pursuant to the Federal Rules of Civil Procedure 72(b), 28 U.S.C. § 636(b)(1)(B), and Rule 506 of the Local Rules Governing Duties of and Proceedings Before Magistrates.

The Court also has before it the plaintiff's motion (filed August 17, 1994; Docket Entry No. 46) for summary judgment and its memorandum (Docket Entry No. 47) in support;[1] the defendant's motion (filed August 17, 1994; Docket Entry No. 50) for partial summary judgment and

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[1] On August 17, 1994, the plaintiff also filed a motion (Docket Entry No. 49) for oral argument.

its memorandum (Docket Entry No. 51) in support; as well as the defendant's response (filed September 9, 1994; Docket Entry No. 66) and the plaintiff's response (filed September 6, 1994; Docket Entry No. 69).

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

In his Report and Recommendation, the Magistrate Judge recommended that the plaintiff's motion (filed May 12, 1994; Docket Entry No. 2) for a preliminary injunction be granted with respect to the defendant's waste disposal fee, but denied with respect to the defendant's flow control requirements. For the reasons set forth below, the Court shall approve and adopt the Report and Recommendation. The objections to the Report and Recommendation of the defendant and the plaintiff shall be overruled.

The Court finds that it is able to make its determination with regard to the plaintiff's motion for summary judgment without benefit of oral argument and, therefore, the Court shall deny the plaintiff's motion (Docket Entry No. 49) for oral argument. In addition, the Court shall grant the plaintiff's motion for summary judgment in part and deny it in part. The Court shall also grant the defendant's motion for partial summary judgment in part and deny it in part.

I.

The plaintiff, Waste Management, Inc., of Tennessee, is a waste collector and operator which is licensed to

collect and dispose of waste generated within the geographic boundaries of the defendant, The Metropolitan Government of Nashville and Davidson County (Metro), and has been engaged in this business since 1979. Solid waste generated within Metro's boundaries is collected and disposed of by Metro, three major haulers of which Waste Management is one,[2] and various smaller haulers. Metro owns a waste-to-energy facility in Davidson County which is operated by the Nashville Thermal Transfer Corporation (NTTC) but no landfill since Bordeaux closed in March, 1994. *See* joint reply (filed September 23, 1994; Docket Entry No. 71) ¶ 3. Waste Management owns and operates a transfer station in Davidson County which processes solid waste for disposal at its primary landfill located in Benton County, Tennessee, as well as its backup site located in Logan County, Kentucky. *Id.* ¶¶ 4, 21-23; stipulated facts (filed June 2, 1994; Docket Entry No. 15) ¶¶ 13-15.

Effective January 2, 1991, Metro enacted a regulation which established a licensing system for persons engaged in the management of solid waste within Metro's boundaries. Stipulated facts ¶ 1. This system imposes flow control restrictions on the disposal of solid waste which require that solid waste collected within Davidson County be disposed of at sites approved by Metro. *Id.*

An amendment to this regulation further imposes the flow control restrictions which require that all residential

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[2] The other two major haulers are Browning Ferris Industries (BFI) and Sanifill. *See* joint reply (filed September 23, 1994; Docket Entry No. 71) ¶ 1.

solid waste collected within Metro's boundaries be disposed of at NTTC. *Id.* ¶ 16. Commercial solid waste is not required to be disposed of at NTTC unless specifically designated for disposal there if an operator's mandatory pro rata contribution of solid waste has not been fulfilled. *See id.*, appendix A at 9. Metro issues mandatory weekly allotments of solid waste to be disposed of at NTTC only to the three major haulers of solid waste, namely, Waste Management, Browning Ferris Industries (BFI), and Sanifill. Joint reply ¶ 27.

Metro also enacted an ordinance which imposes a waste disposal fee of eight dollars per ton upon persons enjoying the privilege of providing temporary or permanent disposal of solid waste. *See* stipulated facts (Docket Entry No. 15) ¶ 4 and appendix B at 3. This fee is not imposed on municipal solid waste which is disposed of at NTTC, however. *Id.* ¶ 4. This ordinance was further amended to extend the fee of eight dollars per ton to persons who collect solid waste within the boundaries of Metro and dispose of such solid waste outside Metro's boundaries. Joint reply ¶ 10. Metro only assesses this fee against Waste Management, based upon its operation of a transfer station within Metro, and against BFI, based upon its landfill located in Rutherford County.[3] Stipulated facts ¶ 8.

With certain exceptions which are not pertinent to this action, all Metro sanitary landfills, incinerators or other collection stations (including NTTC) must charge a

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[3] BFI does not use a transfer station or any other intermediate disposal point. *Id.* ¶ 10.

tip fee of thirty-six dollars per ton. *Id.* ¶ 5. The current tipping fee charged at Waste Management's transfer station is also thirty-six dollars per ton, which does not include Metro's eight-dollar surcharge. *Id.* ¶ 18.

Finally, Metro's ordinance requires that all persons enjoying the privilege of providing temporary or permanent disposal of solid waste within Metro's boundaries accept waste from standard pickup trucks for a fee of five dollars per load, as well as provide containers for free disposal of solid waste from passenger vehicles at the facility's entrance. *See* stipulated facts, appendix B at 2-3. These requirements do not apply to Waste Management's private competitors, however, since they do not operate temporary or permanent disposal facilities within Metro's boundaries, joint reply ¶ 36, nor do these requirements apply to NTTC, which does not accept solid waste from either standard pickup trucks or passenger vehicles. *Id.* ¶ 37.

The plaintiff originally filed its complaint (Docket Entry No. 1) and its motion (Docket Entry No. 2) for a preliminary injunction on May 12, 1994. The plaintiff alleges that Metro's imposition of a waste disposal fee and flow control requirements violates the Commerce Clause of the United States Constitution. The plaintiff further alleges that Metro's requirements that the plaintiff provide free containers for disposal of waste delivered by passenger vehicles and that the plaintiff charge only five dollars per load of waste received from non-commercial trucks constitute a taking of the plaintiff's property without just compensation, thereby violating the Fifth Amendment of the Constitution.

The defendant responded to the plaintiff's motion for a preliminary injunction and asserted that its regulations do not violate the Constitution. *See* defendant's response (filed May 27, 1994; Docket Entry No. 8) and memorandum (Docket Entry No. 9) in support; and defendant's supplemental memorandum (filed May 31, 1994; Docket Entry No. 13).

By order (Docket Entry No. 14) entered June 2, 1994, the plaintiff's motion for a preliminary injunction was referred to the Magistrate Judge for a Report and Recommendation concerning its proper disposition. Following the entry of the Magistrate Judge's Report and Recommendation (Docket Entry No. 17) on June 13, 1994, the plaintiff filed its motion (Docket Entry No. 46) for summary judgment and the defendant filed its motion (Docket Entry No. 50) for partial summary judgment.

The parties have agreed that there are no genuine issues of material fact with regard to the determination of their cross motions for summary judgment and, therefore, the Court shall resolve the parties' dispute on the basis of the record before it.

II.

The standard for injunctive relief and its application are fully articulated by the Magistrate Judge in his Report and Recommendation and need not be reiterated here. Report and Recommendation (Docket Entry No. 17) at 15-23.

In his Report and Recommendation, the Magistrate Judge recommended that the plaintiff's motion (Docket

Entry No. 2) for a preliminary injunction be granted with respect to the defendant's waste disposal fee[4] since the plaintiff was likely to succeed in establishing that this fee constitutes a discriminatory local law which violates the Commerce Clause. Report and Recommendation at 19-20. However, the Magistrate Judge concluded that the plaintiff does not have a substantial likelihood of success and that a preliminary injunction should not issue with regard to the defendant's flow control requirements.[5] *Id.* at 24-25.

In arriving at the latter conclusion, the Magistrate Judge determined that the defendant's flow control requirements do not result in a monopoly, nor do they exclude waste disposal outside of Metro. *Id.* at 23. Noting that enforcement of these requirements is limited, *id.* at 23-24, and that there was no evidence that the plaintiff is treated differently in the quota demands than are other waste collection and disposal companies, the Magistrate Judge concluded that this provision of the ordinance is nondiscriminatory and has only an incidental impact on interstate commerce. *Id.* at 24.

In its objections to the Report and Recommendation, Metro contends that the Magistrate Judge erred in concluding that the waste disposal fee falls into the category of virtually *per se* discriminatory legislation. Defendant's objections (Docket Entry No. 23) at 10. More specifically, the defendant notes that although the waste disposal fee

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[4] *See* plaintiff's memorandum (Docket Entry No. 47), exhibit 2 at 1.

[5] *See* stipulated facts (Docket Entry No. 15), appendix A at 9-10.

is not imposed upon waste disposed of in Davidson County, a much higher fee is actually charged pursuant to another provision. *Id.* at 11. In addition, the defendant contends that the plaintiff has failed to demonstrate irreparable harm. *Id.* at 14-16. Finally, the defendant asserts that Metro will be impaired in its ability to govern and the public will be harmed if a preliminary injunction is granted. *Id.* at 16-17.

As might be expected, the plaintiff objects to the Magistrate Judge's recommendation that its motion for a preliminary injunction with regard to the flow control requirements be denied. Plaintiff's objections (Docket Entry No. 24) at 1. More specifically, the plaintiff contends that the defendant's flow control requirements fall under the Commerce Clause's virtually *per se* rule against discriminatory local laws and that Metro failed to demonstrate under rigorous scrutiny that it has no other means to advance its legitimate local interest. *Id.* at 7. Alternatively, the plaintiff asserts that the defendant has failed to establish that its flow control requirements are evenly enforced and have only incidental effects on interstate commerce. *Id.* at 11. Finally, the plaintiff contends that the burden imposed by the defendant's flow control requirements is clearly excessive in relation to the putative local benefits. *Id.*

After independently reviewing the Magistrate Judge's findings and conclusions and the entire record, the Court finds that the Magistrate Judge's findings and conclusions are correct and that the objections of the plaintiff and the defendant are without merit. Accordingly, the Court shall adopt and approve the Report and Recommendation and overrule the parties' objections.

III.

As provided by Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202, 211 (1986). In its consideration of the evidence, the Court must view all facts and inferences to be drawn therefrom in the light most favorable to the non-moving party. *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1349 (6th Cir. 1991).

In order to prevail on a summary judgment motion, the moving party bears the burden of proving the absence of a genuine issue of material fact concerning an essential element of the opposing party's action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); *Davidson & Jones Dev. Co.*, 921 F.2d at 1349; *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). A dispute about the material fact must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the non-moving party."[6] *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510, 91

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[6] The Supreme Court further explained that a court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

L.Ed.2d at 211-12. Since the preponderance of the evidence standard is used in this determination, more than a mere scintilla of evidence in support of the plaintiff's position is required. *Id.* at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Once a motion for summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." *Davidson & Jones Dev. Co.*, 921 F.2d at 1349. The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274; *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989).

IV.

As noted by the Magistrate Judge, Report and Recommendation (Docket Entry No. 17) at 17, the plaintiff's action arises under the dormant or negative Commerce Clause, which provides that the states are denied "the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. ___, ___, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13, 20 (1994). The Supreme Court of the United States has explained that this prohibition encompasses the advancement of a state's "own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't*

of Natural Resources, 504 U.S. 353, ___, 112 S.Ct. 2019, 2023, 119 L.Ed.2d 139, 147 (1992) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535, 69 S.Ct. 657, 663, 93 L.Ed. 865, 872-73 (1949)). A state statute which discriminates against interstate commerce is unconstitutional "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Fort Gratiot*, 504 U.S. at ___, 112 S.Ct. at 2024, 119 L.Ed.2d at 147 (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 274, 108 S.Ct. 1803, 1808, 100 L.Ed.2d 302, 308 (1988)).

In determining whether a given law violates the dormant Commerce Clause, the court must first determine whether the law in question is a neutral regulation having only incidental effects on interstate commerce, or whether the law treats in-state and out-of-state economic interests differentially, favoring in-state interests. *Oregon Waste*, 511 U.S. at ___, 114 S.Ct. at 1350, 128 L.Ed.2d at 21. A nondiscriminatory law which effectuates a legitimate local interest and only incidentally affects interstate commerce is valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174, 178 (1970). However, a law which discriminates against interstate commerce in favor of local business or investment is *per se* invalid, *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. ___, ___, 114 S.Ct. 1677, 1683, 128 L.Ed.2d 399, 409 (1994); *Oregon Waste*, 511 U.S. at ___, 114 S.Ct. at 1350, 128 L.Ed.2d at 21, unless it falls within the narrow exception in which "the municipality can demonstrate, under rigorous scrutiny, that it

has no other means to advance a legitimate local interest." *Carbone*, 511 U.S. at ___, 114 S.Ct. at 1683, 128 L.Ed.2d at 409.

As noted by the Supreme Court, it is well-established that a state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, ___, 112 S.Ct. 2009, 2014, 119 L.Ed.2d 121, 132 (1992) (citing *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S.Ct. 2620, 2622, 81 L.Ed.2d 540, 545 (1984)). A tax or fee of this kind is clearly discriminatory and forbidden by the dormant Commerce Clause. *Chemical Waste Mgmt.*, 504 U.S. at ___, 112 S.Ct. at 2014, 119 L.Ed.2d at 132.

A state may not avoid the requirements of the dormant Commerce Clause by simply limiting the movement of articles of commerce through its subdivisions. *Fort Gratiot*, 504 U.S. at ___, 112 S.Ct. at 2024, 119 L.Ed.2d at 148. It is well-established that solid waste is an article of commerce, *id.* at ___, 112 S.Ct. at 2023, 119 L.Ed.2d at 146-47, as is the service of processing and disposing of solid waste. *Carbone*, 511 U.S. at ___, 114 S.Ct. at 1682, 128 L.Ed.2d at 408. Therefore, the regulation of such articles of commerce is subject to the strictures of the dormant Commerce Clause.

V.

A. Waste disposal fee

In its motion (Docket Entry No. 46), the plaintiff contends that it is entitled to summary judgment because the defendant's waste disposal fee violates the Commerce

Clause of the Constitution since it is a *per se* discriminatory local law and Metro cannot prove that it has no other means to advance its local interest. In the alternative, the plaintiff contends that even if this regulation is not *per se* discriminatory, it must be stricken as unconstitutional because the defendant has failed to prove that the requirements set forth in *Pike* have been fulfilled.[7]

In response, the defendant asserts that the waste disposal fee is not *per se* discriminatory and that the *Pike* criteria have been fulfilled and, therefore, the fee is valid. Alternatively, the defendant contends that even if the waste disposal fee is discriminatory, the evidence indicates that the requirements set forth in *Oregon Waste* and *Carbone* have been fulfilled,[8] rendering the waste disposal fee constitutional.

The provision imposing the waste disposal fee, as amended, purportedly applies to all persons who provide temporary or permanent disposal of solid waste generated within Metro's boundaries, including those who dispose of such waste within as well as outside Metro's

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[7] More specifically, the plaintiff alleges that the defendant has failed to prove that Metro has evenly enforced the fee, that the fee has only incidental effects on interstate commerce, and that the burden imposed by the fee is not excessive relative to the putative local benefits. *See* plaintiff's memorandum (Docket Entry No. 47) at 12.

[8] The defendant specifically alleges that an intrastate tax burden exists for which the state is attempting to compensate, that the intrastate tax roughly approximates the amount of interstate tax, and that these taxes are based upon substantially equivalent events. *See* defendant's response (Docket Entry No. 66) at 2-4.

boundaries. *See* plaintiff's memorandum (Docket Entry No. 47), exhibit 2 at 1. However, the provision further specifies that the fee is not imposed on solid waste disposed of at NTTC or at a sanitary landfill owned or operated by Metro. *Id.* In addition, it is undisputed that Metro assesses this fee of eight dollars per ton only against Waste Management and BFI, both of which dispose of solid waste at facilities outside Metro's boundaries. Stipulated facts (Docket Entry No. 15) ¶¶ 8, 10, 13. It is also undisputed that the revenue generated from this surcharge is placed in a solid waste fund, some of which finances NTTC's activities. Joint reply (Docket Entry No. 71) ¶ 12. Thus, this provision is discriminatory since in-state and out-of-state economic interests are treated differentially, with local interests being benefited and non-local interests being burdened by Metro's assessment of its surcharge. Furthermore, there is no evidence before the Court which identifies any intrastate tax burden for which Metro is attempting to compensate through its waste disposal fee and, therefore, the surcharge cannot be considered a fair share tax. *Oregon Waste*, 511 U.S. at ___, 114 S.Ct. at 1352, 128 L.Ed.2d at 24.

Since the waste disposal fee is discriminatory, it must be invalidated unless Metro can demonstrate that this fee "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at ___, 114 S.Ct. at 1351, 128 L.Ed.2d at 22 (citing *New Energy Co. v. Limbach*, 486 U.S. 269, 278, 108 S.Ct. 1803, 1810, 100 L.Ed.2d 302, 311 (1988)). The parties concede that a reasonable nondiscriminatory alternative to the surcharge is available as a revenue measure,

namely, a generator or container tax imposed on all residential and commercial solid waste generated in Davidson County. *See* joint reply ¶ 24. Therefore, the waste disposal fee must be invalidated as unconstitutional.[9]

Accordingly, the Court shall grant the plaintiff's motion for summary judgment and shall deny the defendant's motion for partial summary judgment with regard to the constitutionality of the defendant's waste disposal fee.

B. Flow control requirements

The plaintiff contends that the defendant's flow control requirements also violate the Commerce Clause of the Constitution since they are *per se* discriminatory and Metro cannot prove that it has no other means to advance its local interest. *See* plaintiff's memorandum (Docket Entry No. 47) at 13. In the alternative, the plaintiff contends that even if the flow control provision is not *per se* discriminatory, it must be stricken as unconstitutional because the defendant has failed to prove that the criteria set forth in *Pike* have been fulfilled.[10] *Id.* at 17.

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[9] The Court notes that even if the waste disposal fee is not discriminatory, it would be unconstitutional in light of Metro's uneven enforcement of the fee, as well as the fee's effects and resulting excessive burden on interstate commerce. *Pike*, 397 U.S. at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178.

[10] More specifically, the plaintiff alleges that the defendant has failed to prove that Metro has evenly enforced the requirements, that the requirements have only incidental effects on interstate commerce, and that the burden imposed by the requirements is not excessive relative to the putative local benefits. *See id.* at 17-18.

In response, Metro asserts that its flow control provision is nondiscriminatory and only incidentally impacts interstate commerce. Defendant's memorandum (Docket Entry No. 51) at 9. The defendant further contends that the *Pike* criteria have been fulfilled and, therefore, this provision is valid. Alternatively, Metro asserts that even if the flow control provision is discriminatory, the evidence indicates that the criteria set forth in *Oregon Waste* and *Carbone* have been fulfilled,[11] rendering this provision constitutional.

Examination of the flow control provision reveals that it requires that all residential solid waste collected within Metro's boundaries be disposed of at NTTC. *See* stipulated facts (Docket Entry No. 15), appendix A at 9. It also states that nonresidential solid waste is not required to be disposed of at NTTC unless a collector has not provided its pro rata share of solid waste necessary for NTTC's operation. *Id.* at 9-10. While it is undisputed that Metro only issues mandatory weekly allotments to the three major haulers of solid waste, Waste Management, Sanifill, and BFI, joint reply (Docket Entry No. 71) ¶¶ 27-28, there is no evidence to suggest that the underlying reason for this is the fact that two of the three major haulers dispose of some solid waste outside Metro's boundaries. Nor is there any evidence that the three major haulers are treated differently with regard to their pro rata shares relative to other haulers. As noted previously, the mandatory allotments are required only if

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[11] The defendant specifically alleges that it has no other alternate means to advance its legitimate local interests. *See* defendant's memorandum at 10.

necessary to fulfill a collector's requisite pro rata contribution. *See* stipulated facts (Docket Entry No. 15), appendix A at 9-10. The evidence before the Court indicates that the solid waste delivered to NTTC by the smaller haulers fulfills their requisite pro rata shares and, therefore, such allotments are simply unnecessary. *See, e.g.*, Wiles deposition (filed August 17, 1994; Docket Entry No. 61) at 96; Wiles deposition (filed August 17, 1994; Docket Entry No. 62) at 176.

In addition, it is important to note that, in contrast to the contested regulation in *Carbone*, Metro's flow control provision is not simply a means to generate revenue which, by itself, would not constitute a legitimate local interest which can justify discrimination against interstate commerce. 511 U.S. at ___, 114 S.Ct. at 1684, 128 L.Ed.2d at 409-10. While it is true that the flow control provision generates revenue for Metro and enables NTTC to meet its contractual obligations to supply energy to numerous buildings in downtown Nashville,[12] it also implicates significant public environmental interests. For example, the provision serves to ensure that a proportion of solid waste collected within Metro's boundaries is used as fuel,[13] as well as enables Metro to comply with a

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[12] Metro points out that NTTC currently has long-term contracts to provide the heating and cooling for thirty-eight downtown buildings. *See* defendant's objections (Docket Entry No. 23) at 9. Absent the substantial remodeling of the majority of these buildings, a viable alternative means of heating and cooling does not exist. *Id.*

[13] The evidence indicates that long-term reliance on natural gas, rather than garbage, as fuel to provide the necessary heating and cooling for these buildings would result in unacceptably high levels of air pollution. *See* defendant's objections at 9.

state statutory mandate concerning a solid waste management plan.

The Court further notes that in *Carbone* the Supreme Court recognized that as a result of increasing solid waste and decreasing landfill capacity, state and local governments have had to develop efficient and lawful waste control systems which are also protective of the environment. 511 U.S. at ___, 114 S.Ct. at 1680, 128 L.Ed.2d at 405. The Supreme Court concluded that such control systems must be limited, however, such that state and local governments "may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.* at ___, 114 S.Ct. at 1684, 128 L.Ed.2d at 410. *See also Waste Recycling v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566, 1570 (M.D. Ala. 1993), *aff'd*, 29 F.3d 641 (1994) (striking ordinance requiring all solid waste generated in city be delivered to one disposal); *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 778 (D.R.I.), *aff'd*, 947 F.2d 1004 (1991) (striking regulations which totally prevented solid waste from being transported out of state for disposal).

It is significant that Metro's flow control provision does not totally exclude disposal of solid waste outside Metro nor create or result in a monopoly for NTTC. As noted by the Supreme Court in its comments concerning local processing requirements, "[t]he essential vice in laws of this sort is that they bar the import of the processing service." *Carbone*, 511 U.S. at ___, 114 S.Ct. at 1683, 128 L.Ed.2d at 408. Because the provision does not require all solid waste to be processed at NTTC, out-of-state competitors are not deprived of access to any local

market as occurred in *Carbone*. *Id.* at ___, 114 S.Ct. at 1680, 1681, 128 L.Ed.2d at 405, 407. Rather, Waste Management may still dispose of a significant portion of the solid waste it collects at facilities other than NTTC, including facilities outside Metro or outside the state.

Thus, the Court concludes that Metro's flow control provision is a nondiscriminatory and neutral regulation which effectuates a legitimate local interest. Because its effect on interstate commerce is incidental and not "clearly excessive in relation to the putative local benefits," *Pike*, 397 U.S. at 142, 90 S.Ct. at 847, 25 L.Ed.2d at 178, the Court further concludes that the provision does not violate the Commerce Clause.

Accordingly, the Court shall deny the plaintiff's motion for summary judgment and shall grant the defendant's motion for partial summary judgment with regard to the constitutionality of the defendant's flow control provision.

VI.

The Fifth Amendment to the United States Constitution, which is made applicable to the states through the Fourteenth Amendment, provides that private property may not be taken for public use without just compensation. As noted by the Supreme Court, this constitutional provision serves "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard*, 512 U.S. ___, ___, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304, 316 (citing *Armstrong v. United*

States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554, 1561 (1960)).

It is generally the case that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250, 265 (1987) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326 (1922)). It is well-established that a land-use regulation constitutes a taking, thereby violating the Fifth Amendment, when it "does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980) (citations omitted). The range of governmental interests and regulations which satisfy these requirements is admittedly broad. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677, 688 (1987).

VII.

Metro's regulations concerning waste collection and disposal include an ordinance which requires that those who enjoy the privilege of providing such services "shall provide without charge sufficient containers at or near the entrance for the use of persons in passenger cars disposing of such waste." *See* stipulated facts (Docket Entry No. 15), appendix B at 2. In yet another section, such persons are required to "accept waste from private standard pickup trucks at a fee of five dollars per load." *See id.*, appendix B at 3. It is readily apparent that such

requirements substantially advance legitimate state interests, namely, the efficient and timely collection and disposal of solid waste, by increasing the visibility and convenience of waste management facilities.

The plaintiff contends that it is entitled to summary judgment because these requirements constitute a taking of its property without just compensation, thereby violating the Fifth Amendment to the Constitution. In response, the defendant asserts that this constitutional challenge is fatal because regulation of the transfer and disposal of waste is a valid exercise of governmental power, these requirements are simply minor intrusions which do not result in any permanent physical occupation of the plaintiff's property, and the plaintiff is not deprived of all economically beneficial use of its land. *See* defendant's response (Docket Entry No. 66) at 13-15. The defendant's assertions have considerable merit.

As an initial matter, the plaintiff contends that the provisions both take and invade its property because Waste Management

> is required to designate an area on the property for such activities, to prepare that area to accept solid waste, to place containers on that area of the property to receive such solid waste, to physically receive such solid waste on the property, and to allow access to such vehicles for the disposal of such solid waste.

Plaintiff's memorandum (Docket Entry No. 47) at 19. These arguments ring hollow in light of the fact that Waste Management is in the business of collecting and disposing of solid waste and, therefore, its physical plants already have the physical modifications required

to receive and process such waste. Access to its physical plants is a necessary aspect of conducting the plaintiff's business. Placement of containers near its entrance to facilitate acceptance of solid waste from passenger vehicles, as well as allowing access to such vehicles and standard pickup trucks, must be recognized as only minor intrusions which are clearly justified by the important legitimate state interests they serve. As such, these provisions hardly comprise a taking of the plaintiff's property.

The plaintiff also complains that implementation of these provisions requires that Waste Management "accept, process, transport, and dispose of such solid waste with little or no compensation at a financial loss" and results in an expenditure of capital which deprives the plaintiff of economically beneficial use of its property. *See* plaintiff's memorandum at 19-20. The Court notes that, while some minimal reduction in profits may necessarily result from these provisions, Waste Management is clearly not deprived of economically beneficial use of its property. Indeed, the contested provisions allow the plaintiff to obtain five dollars for each pickup truckload collected.

Finally, the plaintiff's reliance on *Dolan* and *Nollan* in arguing that imposition of the provisions as permit conditions would deny its right to operate a transfer station on the property is misplaced. Plaintiff's memorandum at 20-21. Unlike the situation in *Dolan*, the plaintiff has not been required to deed portions of its property to Metro and, therefore, has not been forced to give up its constitutional right to compensation for that property. 512 U.S. at ___, 114 S.Ct. at 2316, 129 L.Ed.2d at 316. Rather, the

conditions imposed by Metro's ordinance constitute simply a limitation on the use Waste Management might make of its property. *Id.* Likewise, the plaintiff has not suffered an easement equivalent to " 'permanent physical occupation' of the property, by the government itself or by others," as occurred in *Nollan*.[14] 483 U.S. at 832, 107 S.Ct. at 3146, 97 L.Ed.2d at 686.

The Court concludes that the provisions requiring that Waste Management accept waste from standard pickup trucks for five dollars per load and provide containers for disposal of waste from passenger vehicles without charge do not comprise a taking of the plaintiff's property. Accordingly, the Court shall grant the defendant's motion for partial summary judgment and shall deny the plaintiff's motion for summary judgment with regard to the plaintiff's Fifth Amendment claim.

VIII.

After independently reviewing the Report and Recommendation and the entire record, the Court finds the Magistrate Judge's findings and conclusions are correct and, therefore, shall approve and adopt the Report and Recommendation. The defendant's objections and the plaintiff's objections to the Report and Recommendation shall be overruled.

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[14] The Court notes that in *Nollan* the Supreme Court opined that a condition attached to the granting of the building permit which required that the plaintiffs provide a viewing spot on their property would be constitutional even though it would comprise "a permanent grant of continuous access to the property." 483 U.S. at 836, 107 S.Ct. at 3148, 97 L.Ed.2d at 689.

Accordingly, the Court shall grant the plaintiff's motion for injunctive relief with regard to the constitutionality of the defendant's waste disposal fee. In addition, the Court shall grant the plaintiff's motion for summary judgment and deny the defendant's motion for partial summary judgment with regard to the waste disposal fee.

However, the Court shall deny the plaintiff's motion for injunctive relief with regard to the constitutionality of the defendant's flow control provision. The Court shall also grant the defendant's motion for partial summary judgment and deny the plaintiff's motion for summary judgment with regard to the flow control provision.

Finally, the Court shall grant the defendant's motion for partial summary judgment and deny the plaintiff's motion for summary judgment with regard to the plaintiff's Fifth Amendment claim.

An appropriate order shall be entered.

/s/Thomas A. Higgins
Thomas A. Higgins
United States District Judge
5-17-95/

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WASTE MANAGEMENT, INC. OF TENNESSEE	]	No. 3-94-0411
v.	]	Judge Higgins
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY	]	

ORDER

In accordance with the memorandum contemporaneously entered, the Court approves and adopts the Report and Recommendation of the Magistrate Judge (entered June 13, 1994; Docket Entry No. 17). The defendant's objections (filed June 24, 1994; Docket Entry No. 23) and the plaintiff's objections (filed June 24, 1994; Docket Entry No. 24) to the Report and Recommendation are overruled.

Accordingly, the Court grants the plaintiff's motion (filed May 12, 1994; Docket Entry No. 2) for injunctive relief with regard to the defendant's waste disposal fee, but denies the plaintiff's motion for an injunction with regard to the defendant's flow control provision.

In addition, the Court denies the plaintiff's motion (filed August 17, 1994; Docket Entry No. 49) for oral argument. The Court grants the plaintiff's motion (filed August 17, 1994; Docket Entry No. 46) for summary judgment and denies the defendant's motion (filed August 17, 1994; Docket Entry No. 50) for partial summary judgment

with regard to the waste disposal fee. The Court also grants the defendant's motion (Docket Entry No. 50) for partial summary judgment and denies the plaintiff's motion (Docket Entry No. 46) for summary judgment with regard to the defendant's flow control provision.

Finally, the Court grants the defendant's motion (Docket Entry No. 50) for partial summary judgment and denies the plaintiff's motion (Docket Entry No. 46) for summary judgment with regard to the plaintiff's Fifth Amendment claim.

Accordingly, the defendant is permanently enjoined from enforcing section 11A of Ordinance No. 093-821.

Entry of this order shall constitute the judgment in this action.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States
District Judge
5-17-95

PUBLIC WORKS REGULATION ON COLLECTION AND DISPOSAL OF SOLID WASTE

The following regulations are adopted by the Director of the Department of Public Works pursuant to Metropolitan Ordinance §§ 36-1-43 and 36-2-9; T.C.A. §§ 7-54-103(d) and 68-31-101, *et seq.*; and §§ 1.05, 2.01(7), 2.01(19), 2.01(40) and 8.402(b) of the Metropolitan Charter.

SECTION I. DEFINITIONS.

(a) *Director* means the Director of the Department of Public Works, or his designated representative.

(b) *Solid Waste* means all municipal, commercial or industrial solid waste, garbage, rubbish, refuse, and other such similar and related materials, including without limitation recyclable materials when they become discarded, except those excluded by the Tennessee Department of Public Health, which will designate as "special waste" any hazardous or other waste it determines should not be processed in an energy production facility for reasons of public health or safety or because the nature of the waste is such that it is not suitable for processing in an energy production facility.

(c) *Person* means any and all persons, natural or artificial, including any individual, firm or association, business trust, partnership, joint venture (provided, however, that as to any business trust, partnership or joint venture in which any federal government corporation has direct, equitable or beneficial ownership, such business trust, partnership or joint venture shall not be included in the definition of "person"), municipality, and public,

municipal, nonprofit or private corporation organized or existing under the laws of this state or any state, and any governmental agency or county of this state and any department, agency or instrumentality of the executive, legislative and judicial branches of the federal government.

(d) *Collector* means a Person engaged in the business of collecting Solid Waste for the purpose of delivery to an Intermediate or Final Disposal Point.

(e) *Disposal* means the delivery of Solid Waste to an Intermediate or Final Disposal Point.

(f) *Hauler* means a Person engaged in the transportation of Solid Waste from a processing or recycling center, or other Intermediate Disposal Point to an Intermediate or Final Disposal Point.

(g) *Remover* means a Person engaged in containing or cleaning up solid waste sites.

(h) *Operator* means any Person owning or operating a landfill, transfer station, processing or recycling center, incinerator, or any similar solid waste disposal facility within the boundaries of Davidson County.

(i) *Final Disposal Point* means a location to which Solid Waste is delivered which is intended to be the final, permanent point of disposition, including but not limited to, a landfill or ash landfill.

(j) *Intermediate Disposal Point* means a location to which Solid Waste is delivered which is intended to be non-permanent, including but not limited to, transfer station, processing or recycling center, incinerator, or any other similar facility.

(k) *License* means permission granted by the Metropolitan Government through the Director for the collection, hauling, or removal of Solid Waste; or for ownership or operation of any solid waste disposal facility pursuant to this regulation.

(l) *Licensee* means any Person holding a License.

SECTION II. SCOPE.

(a) No Person shall engage in business as a Collector, Hauler or Remover of Solid Waste, or shall own or operate any solid waste disposal facility within the boundaries of the Metropolitan Government, without first securing a License.

(b) Disposal of all Solid Waste collected within the boundaries of the Metropolitan Government shall be at a site or sites determined by the Director to be (a) appropriate under applicable federal, state and local laws and regulations; (b) necessary to provide for safe and sanitary processing and disposal of Solid Waste; and (c) in the interests of efficient, economical operation of the Metropolitan Government's solid waste management system. The Director shall maintain a written register of such sites. Failure to dispose of Solid Waste at site(s) thus identified by the Director shall be cause for revocation or suspension of a License issued pursuant to this regulation.

(c) The exemptions and exceptions set forth in Metropolitan Ordinance § 36-1-44 are incorporated herein by reference.

(d) The License required by these regulations shall be in addition to the permit required by Metropolitan Ordinance § 36-2-17.

SECTION III. APPLICATION FOR LICENSES.

Application. Any Person desiring to obtain such a License must first submit an application to the Director. The application shall contain the following information:

(1) Applicant's name, business address and telephone numbers.

(2) Proof of public liability insurance satisfactory to the Metropolitan Government issued by a company authorized to do business in the State of Tennessee in the amount of at least $500,000 for automobile and general liability exposure for collectors; at least $3,000,000 for haulers and removers; and at least $10,000,000 for operators of landfills or other disposal facilities; or such other limits as may be determined necessary by the Director with the approval of the Director of the Insurance and Safety Division of the Metropolitan Department of law to ensure the health, safety and welfare of the citizens of Davidson County.

(3) Proposed hours of operation.

(4) Activity for which the applicant wishes to be licensed.

(5) Such other and further information as the director may require.

SECTION IV. EFFECTIVE PERIOD.

The License will be valid for a period of one year and must be renewed annually by submitting a new application to the Director at least 30 days prior to the expiration date of the current License.

SECTION V. ISSUANCE OF LICENSE.

(a) Following review of the information provided pursuant to Section III, the Director may issue a License upon a finding that the applicant (1) has complied with all applicable federal, state and local laws, rules and regulations (2) has furnished proof of public liability insurance (3) has operated and/or demonstrated an ability to operate in a manner which is not injurious to the public health, safety and welfare.

(b) Notification of approval or denial of an application shall be provided to the applicant in writing. If the applicant is denied issuance of a License, he/she may request a hearing within ten (10) days following the issuance of the denial letter. If, after further review, the Director finds that a License should not be granted he shall notify the applicant of his decision within ten (10) days of the hearing. The Director's decision shall be final; but a denied applicant may reapply for a License at any time.

SECTION VI. SUSPENSION OR REVOCATION OF LICENSE.

(a) Failure to dispose of Solid Waste at site(s) identified by the Director pursuant to Section II of this

Regulation shall be cause for revocation or suspension of a License issued pursuant to this regulation.

(b) The Director may suspend or revoke a License if he finds the Licensee is (i) not complying with any applicable federal, state or local laws, rules, or regulations; or (ii) is operating in a manner injurious to the public health, safety or welfare. At least fifteen (15) days notice shall be given of any such suspension or revocation; provided, however, that a suspension or revocation pursuant to subsection (ii) of this subsection may, in the discretion of the Director, take effect immediately.

(c) Any Person desiring to contest such a suspension or revocation may, within 10 days of notification thereof, request a hearing before the Director. The Director shall schedule a hearing within 30 days of receiving a request. If no timely request for a hearing is made, the determination of the Director shall be final. Hearings before the Director shall be informal and the Director will render a written decision within 15 days of the close of such a hearing. Hearings shall be scheduled only by the Director and may be continued only with his consent.

SECTION VII. EXCEPTIONS.

If the Director finds that an immediate danger to the public health, safety or welfare exists, he may issue a temporary exemption from the licensing requirements to any Person for a period of not more than 60 days. The exemptions set out at Metropolitan Ordinance § 36-2-15(b), respecting private citizens not engaged in the commercial collection, removal and/or disposal of Solid Waste, are incorporated herein by reference. Except

as provided by this section, there shall be no exemptions from the licensing requirements of this regulation.

SECTION VIII. [Reserved].

SECTION IX. This regulation shall take effect the 2 day of January, 1991.

/s/ Peter Heidenreich
Director of Public Works

Approved: /s/ Bill Boner
Mayor

Filed with Metropolitan Clerk,
this 20th day of December, 1990.

/s/ Marilyn S. Swing
Metropolitan Clerk

AMENDMENT TO PUBLIC WORKS REGULATION ON COLLECTION AND DISPOSAL OF SOLID WASTE

The following amendments to the Metropolitan Government's "Public Works Regulation on Collection and Disposal of Solid Waste" are hereby adopted by the Director of the Department of Public Works. These amendments shall take effect the 1 day of April, 1993.

1. Section II (b) is amended by adding the following language following the final sentence thereof:

> Review of the Director's determinations hereunder shall be pursuant to the provisions of Section V(b) of this Regulation, unless such

determination results in revocation or suspension of a License. If such determination results in revocation or suspension of a License, review shall be pursuant to Section VI(c) of this Regulation.

2. The following is incorporated into the Regulation as Section VIII.

Upon notice from the Director, work being performed on any site within Metropolitan Nashville and Davidson County contrary to the provisions of this Regulation shall be immediately stopped. Such notice shall be in writing and shall be given to the owner of the property or to the person doing the work, and shall state the conditions under which the work may be resumed.

/s/ Marlin Keel
Director of Public Works

APPROVED: /s/ Philip N. Bredesen
Mayor

Filed with the Metropolitan Clerk this
10th day of March, 1993.

/s/ Marilyn S. Swing
Metropolitan Clerk

AMENDMENT NO. 2 TO PUBLIC WORKS REGULATION ON THE COLLECTION AND DISPOSAL OF SOLID WASTE

The following amendment to the Metropolitan Government's "Public Works Regulation on Collection and

Disposal of Solid Waste" is hereby adopted by the Director of the Department of Public Works. This amendment shall take effect the 15th day of May, 1994.

The following definition is added to Section I of the Regulation as item (m):

> (m) *Documentation* means any information, records, and data requested or deemed necessary by the Director to verify, support, or clarify, to the satisfaction of the Director, any report, fee, claim, or any other information that must be submitted/reported to the Department of Public Works by any Person pursuant to these Regulations. Such Documentation includes but is not limited to invoices, trip/routing/pull/manifest tickets (that include County of origin of waste and date and time of truck arrival at Disposal Point), customer lists, scale weight tickets (including gross, net, and tare weights of trucks), truck sizes (volume capacity), and dumpster box size, location, and service schedules. Such Documentation shall be available to the Metropolitan Government, upon request, for audit and review during normal business hours.

The following is added to Section II of the Regulation as items (e) and (f):

> (e) Unless otherwise specifically authorized in writing by the Director, all residential Solid Waste collected within the boundaries of the Metropolitan Government shall be disposed of at the Nashville Thermal Transfer Corporation (NTTC), Non-residential Solid Waste is not required to be disposed of at the NTTC unless designated for disposal there pursuant to the following procedure:

(1) Any Collector of Solid Waste collected within the boundaries of the Metropolitan Government shall report the amount of residential and non-residential Solid Waste collected each month and the amounts of Solid Waste delivered to each Final Disposal Point and/or Intermediate Disposal Point. Each Collector shall submit the monthly report to the Director by the Fifteenth (15th) day of the following month on forms provided by the Department of Public Works. Each report must be supported, upon request, with Documentation satisfactory to the Director.

(2) At least quarterly, the Department of Public Works shall calculate a pro rata estimate of the amount of non-residential Solid Waste collected by each Collector, using the best available data.

(3) The NTTC shall notify the Director, at least two (2) weeks in advance, of its estimated need for Solid Waste for each operating day of the corresponding week. The Department of Public Works shall notify each Collector, at least one (1) week in advance, of its estimated pro rata share of Solid Waste, which may include an amount of non-residential Solid Waste if any, necessary for disposal at the NTTC for the following week. Such estimated pro rata shares shall be binding upon all Collectors, unless a Collector demonstrates good cause to the satisfaction of the Director for a revision or an exception.

(f) An Operator shall report the amount of all Solid Waste received each month at the Operator's facility that was generated within the boundaries of the Metropolitan Government and the amount of all Solid Waste received each month at the Operator's facility that was generated outside the boundaries of the Metropolitan Government. Each Operator shall submit the monthly report to the Director by the fifteenth (15th) day of the following month on forms provided by the Department of Public Works. Each report must be supported, upon request, with Documentation satisfactory to the Director.

/s/ Marlin Keel
Director of Public Works

APPROVED:
/s/ Philip N. Bredesen
Mayor

Filed with the Metropolitan Clerk this
4th day of May, 1994.

/s/ Marilyn S. Swing
Metropolitan Clerk

Supreme Court, U.S.
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No. 97-1259

In The

Supreme Court of the United States

October Term, 1997

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Petitioner,

vs.

WASTE MANAGEMENT, INC. OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Waste Management, Inc. of Tennessee is a wholly owned subsidiary of Waste Management of North America, Inc. (formerly named Waste Management, Inc.), which is a wholly owned subsidiary of Waste Management, Inc. (formerly named WMX Technologies, Inc.).

Waste Management, Inc. of Tennessee has no nonwholly owned subsidiaries.

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FACTS OF THE CASE

The parties have stipulated to the facts relevant to this case. Petitioner, Metropolitan Government of Nashville and Davidson County ("Metro"), seeks a writ of certiorari for review of a portion of the decision of the United States Court of Appeals for the Sixth Circuit in *Waste Management, Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson County*, 130 F.3d 731 (6th Cir. 1997). Metro seeks a reversal of the Sixth Circuit's holding that its flow control regulations violate the Commerce Clause of the United States Constitution.

The flow control regulations require, in pertinent part, that all companies collecting, hauling, or removing residential waste within Metro dispose of such residential waste at the Nashville Thermal Transfer Plant ("Thermal"), a waste-to-energy facility owned by Metro and operated by the Nashville Thermal Transfer Corporation ("NTTC"). The flow control regulations also mandate that waste collectors supply unlimited quantities of non-residential waste to Thermal in varying amounts based upon Metro's weekly determination of the amount of solid waste needed to meet Thermal's daily operating needs.

Respondent, Waste Management, Inc. of Tennessee ("WMIT"), one of three major solid waste collectors licensed to do business within the boundaries of Metro, sought to enjoin the enforcement of the flow control regulations. In addition to collecting solid waste, WMIT owns and operates a transfer station in Davidson County, which forwards solid waste to two landfills in Benton County, Tennessee and Logan County, Kentucky. The landfill located in Benton County is operated by WMIT. At times, Metro's weekly allotments to WMIT have exceeded twenty percent of the total amount of all of the solid waste collected by WMIT in Davidson County. The regulations which WMIT challenges, however, permit Metro to flow control

all of the waste collected by WMIT in Davidson County. In support of its request for an injunction, WMIT offered proof that continued enforcement of Metro's flow control regulations and weekly waste allotments would force it to close its transfer station and the Benton County landfill.

PROCEEDINGS BELOW

The Sixth Circuit analyzed the flow control regulations and held that they were discriminatory because

> they require that all residential waste be sent to NTTC, thereby preventing plaintiff from disposing of such waste at a cheaper facility, and threatening the well-being of plaintiff's own dump sites.

Waste Management, 130 F.3d at 736. It found that the flow control measures "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." *Id.* (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)).

Because "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose," *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), Metro was required to show that it had no other means to advance a legitimate local interest. Metro conceded "that it could secure a flow of waste to NTTC by increasing its collections directly or by contract," *Waste Management*, 130 F.3d at 736, but complained that to do so would be time-consuming and require legislative action. The Sixth Circuit found that viable alternatives are available to Metro, and, consequently, struck down the flow control regulations as violating the Commerce Clause, reversing the district court's refusal to enjoin the enforcement of them.

REASONS FOR DENYING THE WRIT

Rule 10 of the Supreme Court Rules requires "compelling reasons" for granting certiorari, and sets forth three categories of cases that deserve discretionary review on certiorari. None of the reasons offered by Metro in its Petition bring this case within one of those three categories, or otherwise satisfy this Court's demanding standards for accepting a case for review.

The first basis for granting certiorari, listed in Rule 10(a), is that a federal court of appeals has ruled contrary to another federal court of appeals or state court of last resort. As Metro has been unable to identify a single circuit court of appeals or state court of last resort that has excused Commerce Clause discrimination that favors a public entity, either in its holding or in dicta, there is no basis for granting certiorari under Rule 10(a). Clearly, this case does not present "a real and embarrassing conflict of opinion and authority between the circuit courts of appeal," *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951), and does not warrant review by this Court. As this Court has stated, "the absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton v. Comm'r of Internal Revenue*, 439 U.S. 940, 945 (1978) (Stevens, J., opinion in denial of certiorari).

The second basis for granting certiorari is listed in subsection (b) of Rule 10, and contemplates a ruling from "a state court of last resort [that] has decided an important federal question" that conflicts with another state court of last resort, or a federal court of appeals. Sup. Ct. R. 10(b). As this case asks that a writ be issued to the United States Court of Appeals for the Sixth Circuit, subsection (b) of Rule 10 clearly has no application to this Petition.

The final basis for granting certiorari, and the only possible basis upon which Metro could rely as grounds for this Court granting its Petition, is that the Sixth Circuit decided an important question of federal law in a way that (1) "has not been, but should be, settled by this Court"; or (2) "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Metro claims that certiorari is warranted because the Sixth Circuit ignored this Court's rulings in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) and *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). *Petitioner's Brief* at 8. Alternatively, Metro contends that the Sixth Circuit's ruling conflicts with "implicit guidance in the existing relevant decisions of this Court. . . ." *Id.*

However, both arguments fail for the reason that, in diligently mining prior decisions of this Court for "implicit" guidance, Metro has ignored the rather *explicit* holdings of those cases. While Metro correctly points out that both *Carbone* and *Fort Gratiot* contain some language discussing a distinction between privately owned and operated disposal sites and similar sites that are publicly owned, it fails to note that such language appeared primarily in dissenting opinions, and that this distinction failed to sway a majority of the Court. As such, the "public-private" distinction urged by Metro has indeed been previously considered — and rejected — by this Court.

Metro asserts that *dicta* in *Fort Gratiot* "specifically reserved judgment on flow control measures affecting publicly owned and operated facilities." *Petitioner's Brief* at 10. However, a careful examination of that decision dispels Metro's reading:

> Before discussing the rather narrow issue that is contested, it is appropriate to identify certain *matters that are not in dispute*. Michigan's comprehensive program of regulating the collection, transportation, and disposal of solid waste . . . is not challenged.

> No issue relating to hazardous waste is presented, and there is no claim that petitioner's operation violated any health, safety, or sanitation requirement. Nor does the case raise any question concerning *policies* that municipalities or other governmental agencies may pursue in the *management of publicly owned facilities.*

Fort Gratiot, 504 U.S. at 358-59 (emphasis added). At issue in *Fort Gratiot* was a form of flow control: whether a Michigan statute could bar private landfill owners from accepting out-of-county solid waste. The italicized language in the last sentence quoted above refers to the ability of a city or county to purchase and manage its own solid waste facility. For example, a publicly owned facility may establish a policy to reject out of county waste at its facility. In any event, the management policies of a publicly owned waste facility are not synonymous with flow control legislation.

Metro claims that *Fort Gratiot* authorizes a government to discriminate against interstate commerce for its own benefit, although it may not do so to aid local businesses. This Court previously has ruled, however, that it makes no difference that the intention behind a discriminatory law is benign, or whether a government acts in the interests of local business, itself, or its citizens in enacting discriminatory measures:

> [T]he evil of protectionism can reside in legislative means as well as ends. Thus, it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution. . . . But whatever New Jersey's ultimate purpose, it may not be accompanied by discriminating against articles of commerce coming from outside the State. . . .

Fort Gratiot, 504 U.S. at 360 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). The Court in *Fort Gratiot* then cited several examples of where "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." 504 U.S. at 360.

Metro's citation of *C & A Carbone, Inc. v. Town of Clarkstown* as support for its "public facility exception" to the Commerce Clause is both unpersuasive and contradictory.[1] First, Metro argues that this case is not governed by *Carbone* and recites a litany of superficial distinctions between the specific facts of each case. *Petitioner's Brief* at 8-9. Metro concludes by asserting that "the single most important distinction is that the transfer station in *Carbone* was not governmentally owned, unlike the waste-to-energy facility in the case at bar." *Id.* at 9.

Having made this distinction, Metro relies almost entirely upon Justice Souter's dissent in *Carbone*, which characterized the transfer station in that case as "essentially a municipal facility" and its operator as "essentially as an agent of the municipal government." *Carbone*, 511 U.S. at 419, 416. Metro claims that Justice Souter's dissent should be treated as governing law instead of the majority opinion, arguing that

> [t]he majority opinion in *Carbone* does not contradict [Souter] because it does not expressly address the issue since technically the transfer station in *Carbone* was not municipally owned and operated.

Petitioner's Brief at 15.

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1. Metro also briefly discusses the Sixth Circuit's decision in *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), but that case's chief virtue is that it predates *Carbone* and *Fort Gratiot* by more than a decade. To the slight extent that flow control and the Commerce Clause was addressed in *Hybud*, its holding has since been supplanted by *Carbone* and *Fort Gratiot*.

In fact, the transfer station in *Carbone* was nominally and temporarily owned by a contractor for five years, as a means of creative financing. 511 U.S. at 387. The town of Clarkstown, New York used flow control as a financing measure that enabled it to build a solid waste transfer station on the site of its recently closed landfill. Rather than issue municipal bonds or assess a general tax, the town financed the $1.4 million facility by giving the private contractor a five-year contract to operate the facility, charging a fee to waste haulers in excess of the market rate. *Id.* After five years, the town was to buy the facility from the contractor for one dollar.[2] *Id.* The Court noted that, "as the most candid of *amici* and even Clarkstown admit, the flow control ordinance is a financing measure." *Carbone*, 511 U.S. at 393.

More importantly, the minutiae of public or private ownership is irrelevant, particularly to those whom the dormant Commerce Clause doctrine was intended to protect the interests who are disadvantaged by protectionist legislation. An examination of the Court's discussion of the dormant Commerce Clause in *Carbone* indicates that the identity of the interests *discriminated against* is more significant than whether the benefits of the discriminatory legislation accrue to private business or the government itself.

> The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is *local economic protectionism*, laws

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2. Metro does admit that "the transfer station in *Carbone* lies closer on the continuum to a publicly owned facility than did the landfill in *Fort Gratiot*." *Petitioner's Brief* at 11. Regardless of how Metro would like to define that continuum, it was certainly a temporary one, because the contractor's five-year contract ended in 1994, rendering the transfer station a public facility. *Carbone*, 511 U.S. at 386-87.

> that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.

Carbone, 511 U.S. at 390 (emphasis added). The fact that discriminatory measures are enacted to benefit a governmental entity rather than local industry does not lessen the resulting economic Balkanization and retaliation.

The critical language in *Carbone* seems almost to have been drafted in anticipation of this case:

> The flow control ordinance . . . hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. . . . The flow control ordinance at issue here squelches competition in the waste processing service altogether. . . .
>
> * * *
>
> The flow control ordinance does serve a central purpose that a non-protectionist regulation would not: It ensures that the town-sponsored facility will be profitable. . . .

Carbone, 511 U.S. at 392-93.

In sum, this Court's final words in *Carbone* are a terse and fitting coda for this case as well. "State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Carbone*, 511 U.S. at 394. That is precisely what

Metro attempted to do through its flow control regulations, and, as such, the Sixth Circuit correctly held Metro's flow control regulations violative of the Commerce Clause of the United States Constitution.

CONCLUSION

Petitioner has failed to present any issues sufficient to invoke the certiorari jurisdiction of the Supreme Court of the United States. For that reason, and for all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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